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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 291

KENNETH M. KEEFE, ERNEST E. QUANTRELL AND PELHAM C. WILMERDING, ON BEHALF OF THEMSELVES AND ALL OTHER OWNERS AND HOLDERS OF BONDS OF NINE MILE-HALFWAY DRAIN DISTRICT OF MACOMB COUNTY, MICHIGAN,

Petitioners,

vs.

NINE MILE-HALFWAY DRAIN DISTRICT, A PUBLIC QUASIM CORPORATION OF MACOMB COUNTY, MICHIGAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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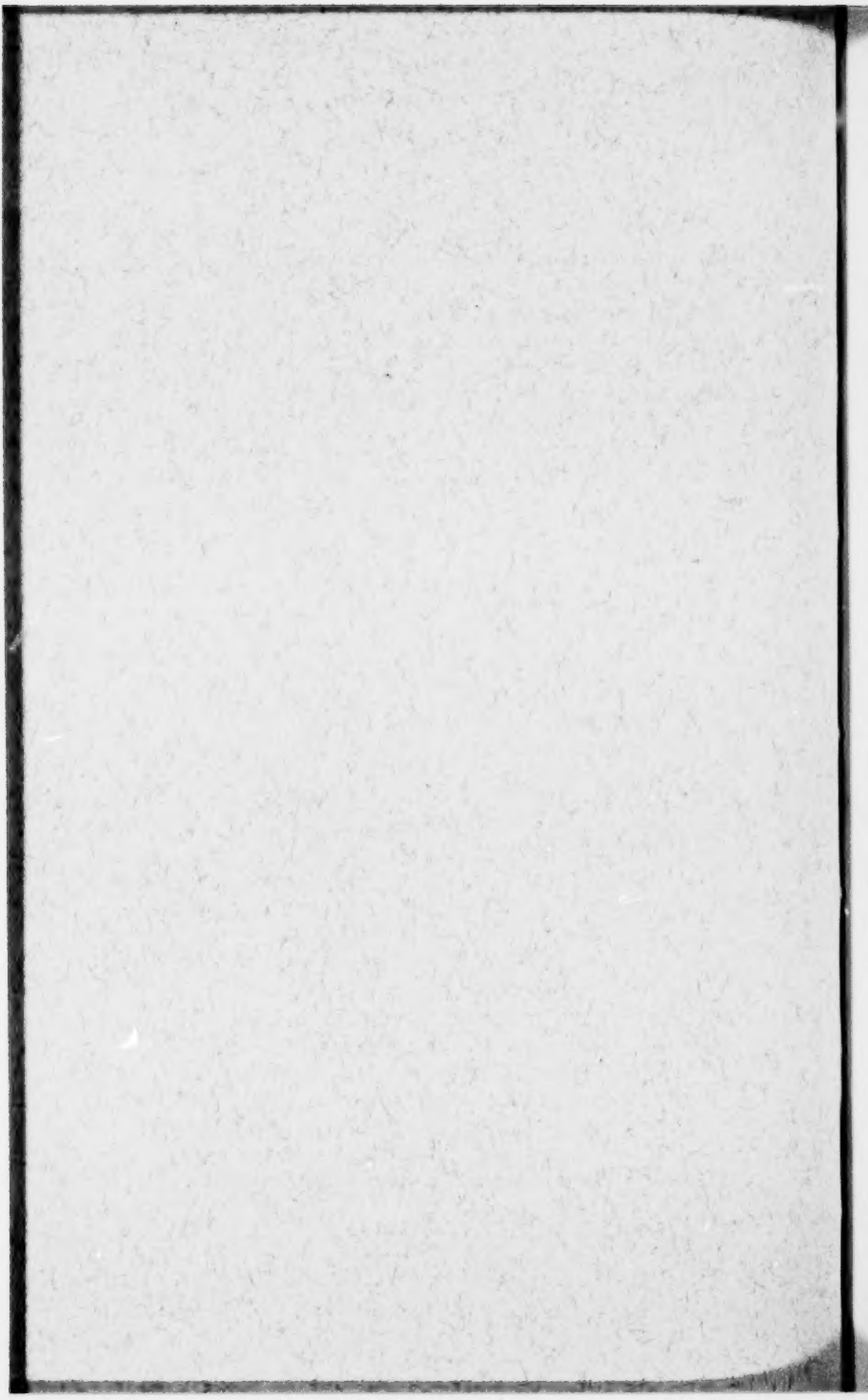

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KENNETH M. KEEFE, ERNEST E. QUANTRELL AND PELHAM C. WILMERDING, ON BEHALF OF THEMSELVES AND ALL OTHER OWNERS AND HOLDERS OF BONDS OF NINE MILE-HALFWAY DRAIN DISTRICT OF MACOMB COUNTY, MICHIGAN,

Petitioners (Appellees Below),

vs.

NINE MILE-HALFWAY DRAIN DISTRICT, A PUBLIC QUASI CORPORATION OF MACOMB COUNTY, MICHIGAN; CARL B. BRANDENBURG, COUNTY TREASURER OF MACOMB COUNTY; GUY L. BROWN, COUNTY CLERK OF MACOMB COUNTY; BERT ENGELBRECHT, DRAIN COMMISSIONER OF MACOMB COUNTY; SHERWOOD BENNETT, COMPTROLLER OF MACOMB COUNTY; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF LAKE, A MUNICIPAL CORPORATION; TOWNSHIP OF WARREN, A MUNICIPAL CORPORATION; TOWNSHIP OF ERIN, A MUNICIPAL CORPORATION; CITY OF EAST DETROIT, A MUNICIPAL CORPORATION; VILLAGE OF CENTERLINE, A MUNICIPAL CORPORATION; ALFRED FOERSTER, CHRIST F. KAISER AND HENRY JACOBS, TAXPAYERS AND ALEXANDER L. WALTENSPERGER AND NELLIE WALTENSPERGER, TAXPAYERS,

Respondents (Appellants Below).

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioners pray that a writ of certiorari issue to review the judgment of the Circuit Court of Ap-

peals for the Sixth Circuit entered March 14, 1941, reversing a judgment of the District Court of the United States for the Southern District of Michigan entered September 15, 1939.

Opinion Below.

The opinion of the District Court (217) confirms a master's report (148). The opinion of the Circuit Court of Appeals (975) was entered March 14, 1941.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938.

Judgment of the Circuit Court of Appeals was entered March 14, 1941. Petition for rehearing was filed April 9, 1941, and denied May 9, 1941, without opinion. Issuance of mandate was stayed by order of that court dated May 15, 1941, for thirty days pending the application for writ of certiorari in this Court.

Summary Statement.

The suit in general involves the question of the right of petitioners, and others of the class for whom suit was brought, to enforce an issue of bonds, of which $1,980,000.00 are still outstanding, issued by the Nine Mile-Halfway Drain District of Macomb County, Michigan.

In Michigan, drain proceedings are conducted by a County officer, the Drain Commissioner, under authority of a law from which we have copied applicable provisions in the appendix (p. 1). The proceedings are instituted by a petition of land owners for the creation of a taxing

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(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record.)

district, followed by a petition for the location and establishment of a drain within the district. A finding of necessity must be made by an independent tribunal convened by the County Probate Court. Assessments to defray construction costs are levied against lands in the district, and may also be levied against the State, county and townships for benefits to roads and other public property. Such assessments may be divided into annual installments, and bonds may be issued in anticipation of the collection thereof. Authority is given to drain districts to issue bonds by Article VIII, Section 15(a) of the State Constitution, which provides: "Any drainage district established under provisions of law may issue bonds for drainage purposes within such district," and by Section 15, Chapter X, of the Drain Law (p. 11, Appendix). Taxes are collected, and if delinquent, enforced as general property taxes through the regular collection and enforcement agencies. Notice of publication, and in some instances personal service, is given of each important step in the proceedings. A review of any question involving any step in the proceedings is provided by certiorari, which must be taken within ten days after the final order of determination, the last step in the proceedings except the issuance of bonds, letting of contracts and confirmation of assessment roll. An appeal from assessment may also be taken within ten days after confirmation of the roll. Except for certiorari and appeal, the statute forbids any other attack on the proceedings, the legality of the drain, or taxes levied therefor. As taxes are collected they are placed in a bond redemption fund in the County treasury, and can be used only to service the bonds. Under some conditions the County is obliged to advance moneys to the redemption fund in case of deficiency, to be reimbursed by later collections of drain taxes. If the amount originally

levied is insufficient to pay the cost of the drain and bonds that have been issued, an additional levy is required. No prescribed form of drain is required, nor is it restricted to storm water. Cities, villages and townships may use it for sewage disposal, and sewage disposal and purification plants may be built in connection with it.

The bonds in question were issued in proceedings strictly conforming to the Drain Law (950-971), and were sold by the district to an investment house at par and accrued interest (256). The investment house almost immediately resold them to the public (257 and 936). With the money received the officers built the drain, which now has been in use for about fourteen years. Until November 1, 1931, maturing interest has been met, and $72,000.00 principal amount of bonds of the district paid. In May, 1932, County officers suspended interest payments and tax collections. Objection to payment of the bonds and levy of taxes is based upon the claim that the improvement was designed and built with the intention that it should serve the dual purpose of removing surface water and sanitary sewage, and that because of this underlying purpose the Drain Commissioner lacked jurisdiction. The proceedings originally designated the project as a tile drain (950-953) with a sewage disposal plant in connection therewith (961), and the official order of necessity (958) by the Board of Determination appointed by the Probate Court designated the project as a drain with "a disposal plant, filtration bed or other mechanical device which will properly purify the flow of said drain (to) be constructed and become a part of said drain as provided by Act No. 316 Public Acts of 1923, as amended by Section 5, Chapter XVII, Act No. 174, Public Acts of 1925." The project is an underground conduit with numerous inlets for the reception of surface water, and of sufficient capacity to transport surface water in times of heavy storms.

The bonds contain recitals (22) that they were issued for the building of the named drain, compliance with the drainage laws specified, and the due happening, existence and performance of all conditions precedent to make them legal and binding obligations.

Petitioners filed their bill (1) in the District Court, alleging the following: Facts necessary to confer jurisdiction on the District Court by reason of diverse citizenship, the proceedings for the building of the drain, the issuance and good faith purchase of the bonds, default and refusal to pay, and refusal to levy taxes. Foundation for an injunction to restrain the diversion of the drain fund was laid by allegations that various taxpayers had sued either to get possession of the fund, or to restrain the levy of further taxes against them or their lands. It appeared from this that the Supreme Court of the State of Michigan had decided that the project in question was illegal in an opinion reported in 257 Mich. 135, in the case of *Township of Lake* v. *Millar*. The Michigan court stated the contention of plaintiffs in that case as follows:

> "Plaintiffs, the township of Lake, Macomb county, Michigan, and a large number of individual landowners in Macomb county, brought the bill of complaint herein against Edward D. Millar, former drain commissioner of Macomb county, Bert Engelbrecht, drain commissioner of Macomb county, Walter Lehner, and William H. Hagen and Henry Heckman, the last two constituting the surviving members of the board of determination for the Nine Mile-Half Way drain, William Kruse, treasurer of Macomb county, the city of East Detroit, a municipal corporation, the village of Center Line, a municipal corporation, and the townships of Erin and Warren in Macomb county, to declare drain proceedings fraudulent and void; to restrain the assessment and collection of taxes or the reassessment and collection of the same; to restrain the drain commissioner and the county treasurer from

using or applying the funds raised by assessment toward the maintenance of the drain, disposal plant, filtration beds, and purification plant; to restrain the treasurer from collecting or attempting to collect the assessments levied against the lands and property of plaintiffs; to restrain the defendant Engelbrecht, his successors, agents, and employees from connecting any branch lateral or intersecting drains with the Nine Mile-Half Way drain, from increasing the overflow and inundation of streets of plaintiff township, to restrain the city of East Detroit, the village of Center Line, and the townships of Erin and Warren from connecting additional intersectors, laterals, branch drains, or sewers to said drain, and from creating any further burden of flowage and from increasing the overflow and inundation of the streets, highways, culverts, and lands of plaintiffs. They ask that defendant Bert Engelbrecht, drain commissioner of Macomb county, his successors, servants, agents, and employees, be restrained from permitting any sewage from the lands lying westerly from the disposal plant, filtration beds, and mechanical devices to purify the flow of said drain, to pass by or through said drain without first passing through the disposal plant, filtration beds, and other mechanical devices to purify the flow of said drain; that by mandatory injunction he be commanded to keep the disposal plant, filtration beds, and mechanical devices in constant and continual operation, and to cause all sewage from the lands lying in a westerly direction therefrom to flow through said plant, filtration beds, and mechanical devices; that the defendant Engelbrecht, his successors, agents, servants, and employees and defendants city of East Detroit and village of Center Line and townships of Erin and Warren, be ordered by decree of this court to take such steps as may be necessary to prevent the inundation of the streets, highways, and culverts and lands of plaintiffs caused by their having increased the flowage of said drain; that defendants be required to reimburse plaintiffs for the unlawful taking of their property and for damages, and that defendant treasurer of Macomb

county be required to reimburse plaintiffs for the assessments paid by them and for other relief. From a decree for defendants plaintiffs appeal."

The Supreme Court of Michigan held in that case as follows:

"The question is presented whether a petition for a drain confers jurisdiction upon the drain commissioner to build a sewer; whether a petition to the drain commissioner to do something within the scope of his authority confers jurisdiction upon him to do something wholly without the scope of his authority; whether a petition to do something he has a right to do confers jurisdiction upon him to do something which he had no right to do; whether upon filing a petition for a drain which he has a right to build, the commissioner may lay out and construct a sewer which he has no right to build? A drain commissioner may not, by mere assumption of authority, legally do that which he has no authority to do. If, upon a petition to do what he has a right to do, he may do what he has no right to do, the extent of his authority is measured by his own acts and conduct and not by law. The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority. The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari, but an entire want of jurisdiction may be taken advantage of at any time. The drain commissioner had no jurisdiction to construct a sewer any more than to construct a Covert road. No one will contend that if the drain commissioner, when the petition for a drain was filed with him, had laid out an assessment district, established and constructed a Covert road, the plaintiffs would have been without remedy. The same legal question is here presented. The proceedings are void for want of jurisdiction. The decree of the trial court is reversed, and decree will be entered for plaintiffs."

No bondholders were parties to the proceeding in the Michigan court. The *Millar* case, *supra*, was followed by two other taxpayers' cases in the Macomb County Circuit Court and no bondholders were parties to these other proceedings (14). The decree in the *Millar* case (25) held all drain proceedings invalid as to complaining parties but did not decree the bonds to be invalid.

The relief prayed by bondholders in this case was a decree establishing the bonds as valid obligations, mandatory injunction compelling the levy of taxes, maintenance of sinking funds, restoration of diverted moneys, accounting and payment of bonds from sinking fund or the County's general fund. The bill also asked that the Township of Lake and other plaintiffs in the *Millar* case, *supra*, be restrained from using the decree they had obtained to impede the collection of taxes. Respondents' answers consist of a denial of the validity of the bonds and taxes on the ground that the improvement was not a drain, and assert that by reason of that fact no rights accrued to bondholders.

The District Court made a limited order of reference to the Standing Master in Chancery who determined (89-96)—(a) all bonds were held by *bona fide* holders for value or by those succeeding to their rights, (b) present holders are entitled to rely on the truth of the recitals in the bonds, (c) defendants were estopped to deny the truth of the recitals.

While decrees for the plaintiffs were being settled in the District Court, the Circuit Court of Appeals decided *Royal Oak Drain District* v. *Keefe*, 87 Fed. (2) 786, and the District Court decided that because of a certain statement in the opinion in that case, it would be advisable to refer the case (144) to a Special Master to determine the primary purpose and character of the project and to settle the terms of the decree.

The Master took testimony (246, *et seq.*) in accordance with the previous orders of reference and filed a complete report (148-203). The Master in his report concluded that the improvement was illegal in the light of certain Michigan court decisions, but that inasmuch as the bonds contained recitals importing compliance with the law and proper performance of all conditions precedent, they were valid in the hands of present holders, and that the recitals were valid under Michigan law (191). He held that the State court decree obtained by Lake Township, *et al.*, was not *res judicata* against bondholders, since they were not parties to the record in that case, and under Michigan law which he cited the decree could not operate against them (151). He further held that there was no obligation on bondholders' part to intervene in the taxpayers' suit (152). Exceptions to the report were taken by defendants (204) on the ground that the Master should not have held that the court had jurisdiction, should not have found that bondholders occupied the position of good faith holders, and should not have applied the estoppel rule. No exception was taken on the ground that he should have held the State court decrees binding to any extent upon bondholders. Plaintiffs excepted (211) to the finding that the improvement was illegal. The court overruled all exceptions (219) and filed a short opinion declaring his view that the bondholders were entitled to recover because of defendants' estoppel to plead the falsity of the bond recitals (217). A judgment was entered substantially as prayed (220), which declared the bonds valid, directed officers to levy and collect taxes, to maintain sinking funds, and restrained defendants from using the decree obtained in the State court to prevent officers from making tax levies. The principal defendants then appealed to the Circuit Court of Appeals, which, as noted above, reversed the judgment.

The opinion of the Circuit Court of Appeals (979) agrees

with the district court in its conclusion that it had jurisdiction, that bonds are held *bona fide*, and that the projects are illegal under Michigan law. It refuses to consider a decision of the Michigan Supreme Court, *Detroit Trust Co.* v. *Dingman*, 291 Mich. 170, holding that a Michigan Drain Commissioner has power to build drains for the removal of both storm water and sewage, holds that parties other than the drain districts are not obliged to recognize the bonds as legal, that the districts are not estopped by their bond recitals, and that the decree in the *Township of Lake* v. *Millar* case, *supra*, is *res judicata* against bondholders. The latter is not stated as an independent ground for reversal, but appears to be interwoven into the court's entire process of reasoning. It is embodied in the question which the court says it has for decision (981), "Whether when the Michigan courts have held that these particular projects and all proceedings thereunder are void, the recitals in the bonds estop appellants, etc." The court had before it another issue which petitioners believe should have been considered in support of the judgment, *i. e.*, the binding effect of the statutory provision forbidding collateral attack on drain proceedings, which petitioners believe was not considered because of the court's view that the bondholders were barred by a prior adjudication.

Questions Presented by This Petition.

The fundamental questions presented are:

1. Whether due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States has been denied petitioners, and other holders of these bonds, in deciding that decrees in a suit brought by taxpayers in the drain district against the Drain Commissioner and others, to which suits no bondholders were parties, were *res judicata* of issues relating to the validity of the bonds

and remedies thereon on the theory that the Drain Commissioner represented bondholders, so that all matters decided in such prior suit, or which might have been decided therein, were adjudications against bondholders.

2. Whether in applying the law of the State of Michigan a Federal court is not bound by the entire body of such law contained in the statutes and court decisions, under such rules of interpretation and construction as the court of last resort of the State would be obliged to follow. Subsidiary to this question are the following:

(a) Whether when the State court of last resort has by its last decision declared the powers of drain districts to build drainage improvements of a particular character, the Federal courts can reject such decision on the ground that it involved a different drainage improvement, and that the State court had not specifically overruled its prior decision relating to the same improvement.

(b) Whether when a State court of last resort has rendered decisions holding that a municipal corporation is estopped against *bona fide* holders of its bonds to plead that the bonds are issued for a purpose different than that which is recited in the bonds, such decisions can be rejected in the absence of a clear showing that such decisions have been overruled.

(c) Whether public officers and other public bodies charged with the duty of performing acts necessary to provide funds for the payment of municipal bonds are excused from performing such acts when liability of the issuing municipality rests upon estoppel.

(d) Whether when a State statute provides that there may be no collateral attack on proceedings for the construction of a drain, and decisions in force when bonds for such

drain were issued interpret such statute to forbid collateral attack except where proceedings violate the constitution, such decisions can be rejected, it being the law of the State that rights which accrue under a statute as judicially interpreted must be judged in accordance with the same interpretation.

3. Whether the lower court has not rendered a decision in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit, in *Fetzer* v. *Johnson,* 15 F. (2d) 145, and in conflict with the decision of this Court in *Chase National Bank* v. *City of Norwalk,* 291 U. S. 431, in refusing to enjoin parties who have obtained decrees or judgments in other courts from enforcing them in a manner inimical to the rights of parties not bound thereby.

Reasons Relied Upon for Allowance of Writ.

1. The United States Circuit Court of Appeals, Sixth Circuit has decided an important question of Federal law, probably in conflict with the Fifth Amendment to the Constitution of the United States, and in conflict with the decision of this Court in *Hansberry* v. *Lee,* 311 U. S. 32.

2. The United States Circuit Court of Appeals, Sixth Circuit, has decided important questions of local law, probably in conflict with local statutes and decisions in the following respects:

(a) It has decided that Nine Mile-Halfway Drain is an illegal structure, in the absence of any violation of the Drain Law by the officers who designed and built it and contrary to the interpretations of such law by the local court of last resort in *Kennedy* v. *Dingman,* 272 Mich. 24, and *Detroit Trust Co.* v. *Dingman,* 291 Mich. 170.

(b) It has decided that a municipality which issues its bonds, reciting therein that the same are issued for a pur-

pose which the law authorizes, is not estopped against *bona fide* holders of said bonds to plead the falsity of its recitals, which decision is in conflict with local decisions as follows: *Common Council* v. *Schlich*, 81 Mich. 405; *Thompson* v. *Village of Mecosta*, 127 Mich. 522; *Schmid* v. *Village of Frankfort*, 131 Mich. 197; *Bates* v. *City of Hastings*, 145 Mich. 574 and *Baker, et al.* v. *Ruddiman #3 Drain District, et al.*, unreported decision of United States District Court, Western District of Michigan, Southern Division.

(c) It has decided that public officers charged with the duty of levying and collecting taxes, maintaining sinking funds for the payment of drain district bonds, and the county charged with the duty of making temporary advancement of moneys in case of drain fund deficiencies, are not obliged to perform such duties when the validity of the bonds rests upon the estoppel of drain districts, its decision in this respect being without statutory warrant and contrary to general law.

(d) It has ignored and failed to give effect to Section 11, Chapter VI, of the Drain Law, Act 316 Public Acts of Michigan of 1923, as amended by Act 331 Public Acts of Michigan of 1927, Section 4902 Michigan Compiled Laws 1929 (see appendix, p. 8), the material part of which reads as follows: "If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity." It has failed to give effect to interpretations of this statute holding that collateral attack on the drain proceedings and taxes therefor is forbidden, contained in *Township of Clarence* v. *Dickinson*, 151 Mich. 270, and *Stellwagen* v. *Dingman*, 229 Mich. 159, and disregarded local decisions holding that judicial interpretations under which rights accrue must continue

to be applied to such rights notwithstanding subsequent inconsistent decisions, *i. e. Pittsburgh, etc., Iron Co.* v. *L. S. Iron Co.,* 118 Mich. 109, and *Donohue* v. *Russell,* 264 Mich. 217.

3. The United States Court of Appeals, Sixth Circuit, has decided important questions as to powers of Federal courts to restrain action to enforce judgments of concurrent courts in a way probably in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, in *Fetzer* v. *Johnson,* 15 F. (2) 145, and in conflict with the decision of this Court in *Chase National Bank* v. *City of Norwalk,* 291 U. S. 431.

4. The Supreme Court of Michigan now has before it a case which we believe will determine the view of the State court as to whether bonds containing similar recitals to those here involved are valid in the hands of good faith holders. City of Highland Park and other holders of bonds of another drain district, Royal Oak No. 7 Storm Sewer Drain District, have petitioned the court to issue a writ of mandamus to compel the Drain Commissioner of Oakland County, Michigan, and the Board of Supervisors of such county, to levy and spread drain taxes for such drain. *City of Highland Park, et al.* v. *Clark, et al.,* No. 41,960, Michigan Supreme Court. Respondents have pleaded that they should not be compelled to do so because, as they allege, the project is a sewer and was so held to be in *Village of Oak Park* v. *Van Wagoner,* 271 Mich. 450. Thus the same issue as was considered by the Circuit Court of Appeals will in all probability be decided within a few months, and will definitely determine the local law on the subject. Petitioners, therefore, believe that if this Court has any hesitancy to issue the writ of certiorari in this case, it should defer action until the State court of last resort has decided the pending action.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review and determination, as provided by the statutes of the United States, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 8573, Nine Mile-Halfway Drain District, et al., Appellants, v. Kenneth M. Keefe, et al., Appellees," and that the decree therein of said Court of Appeals be reversed by this Court, and that your petitioners may have such other and further relief in the premises as to the Court may seem just and proper.

Dated July 19, 1941.

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